

***United States Court of Appeals
for the Second Circuit***



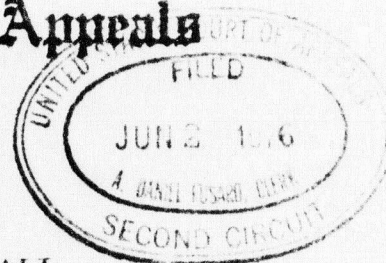
**BRIEF FOR
APPELLEE**

76-7040

*To be argued by
Norman C. Harlowe*

United States Court of Appeals

For the Second Circuit.



MOHAMED ALI and NADIA ALI,
Plaintiffs-Appellants,

against

A & G COMPANY, Inc., and SAADI IBRAHIM,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK.

**BRIEF FOR DEFENDANT-APPELLEE,
SAADI IBRAHIM.**

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STATEMENT

Plaintiffs appeal from an order entered in the Office of the Clerk of the United States District Court Southern District on January 14, 1976 (Judge Lloyd F. MacMahon) dismissing the above entitled action with prejudice against Plaintiffs-Appellants Mohamed Ali and Nadia Ali (plaintiffs) for failure to prosecute and from an order entered in the Office of the Clerk of the United States District Court, Southern District on March 13, 1976 (Judge Lloyd F. MacMahon) denying plain-

tiffs'motion to vacate the order of dismissal.

From these orders plaintiffs appeal to this Court respectively on January 28, 1976 and on April 15, 1976 by serving and filing, Notices of Appeal.

FACTS

This action was dismissed with prejudice against the plaintiffs on January 14, 1976 by the Hon. Lloyd F. MacMahon for failure to prosecute and for failure to comply with stipulated pre-trial orders and for failure to proceed with the trial of this action on January 14, 1976.

A pre-trial order was signed by Judge MacMahon on October 17, 1975 which provided that all pre-trial proceedings be completed by December 17, 1975 and that this action "be added to the ready trial calendar on or after January 9, 1976 and thereafter, following publication of this court's trial calendar in the New York Law Journal shall be ready for trial on short telephone notice " (105 a).

The case came up before Judge MacMahon on January 9, 1976 and counsel for the plaintiffs and the defendant A & G Company, Inc. appeared, and counsel for the defendant Saadi Ibrahim was available for trial. On that day, the attorney for the plaintiffs sought an adjournment, claiming that he was unable to communicate

with plaintiffs despite several attempts during the past three days to reach them by telephone. The application of the attorney for the plaintiffs for an adjournment was denied and the case did not go to trial on that day.

On January 13, 1976, the attorney for the plaintiffs and the attorney for the defendant A & G Company, Inc. appeared before Judge MacMahon. Plaintiffs' counsel again applied for an adjournment which the court denied. The case was reached for trial on January 14, 1976, defendants were ready to proceed, but although plaintiffs counsel appeared, he refused to proceed and insisted on an adjournment, on the ground that he was unable to reach his clients.

Judge MacMahon made an order dismissing the action. Plaintiffs then, moved to vacate the said order of dismissal. Judge MacMahon denied the motion to vacate the dismissal and set forth his reasons which are stated in details in his memorandum decision printed at Pages 97a through 103a of the Appendix.

QUESTION PRESENTED

Under all of the facts and circumstances from the inception thereof to the date of trial did the court below abuse its discretion in dismissing the action for failure to prosecute and in denying plaintiffs' motion to vacate the order of dismissal.

POINT I

The Court below in view of the overall facts and circumstances herein was justified in dismissing this action and the Presiding Judge did not abuse his discretion in dismissing the action and denying the motion to vacate the order of dismissal of the action.

The record is quite clear that plaintiffs' attorney had ample time to prepare for the trial of this case and to advise his clients of the impending trial so that he could go forward with the trial of this action on January 9, 1976 and subsequent days and proceed on January 14, 1976. No adequate excuse or compelling reason for an adjournment of this case beyond January 14, 1976 was submitted by plaintiffs' counsel to justify the court granting him an adjournment.

The memorandum decision by Judge MacMahon setting forth the reasons in dismissing plaintiffs' case with prejudice clearly demonstrate that the record in this case justifies such action on the part of Judge MacMahon. Counsel for the plaintiffs has asserted that he had only twenty minutes of the notice of trial. Such is not the fact as is pointed out by the decision of Judge MacMahon.

"The assertion by plaintiffs' counsel, in his moving affidavit, that he had only twenty minutes' notice of trial distorts the fact that he knew of the probable trial date

for at least four months and had been repeatedly alerted over a period of six days to be ready to proceed to trial on further short telephonic notice".

(Judge MacMahon 100a)

In JOSEPH V. NORTON COMPANY, 273 F. 2d 65, an order of dismissal was affirmed by this Court for this reason, among others:

"When the case has been assigned to a trial part, further adjournment should be granted only for good cause. On this record it is clear that no good cause was shown for further indulgence. It is the interest of everyone concerned with the proper administration of justice, and especially to litigants and witnesses, that our trial courts should move cases forward for trial and dispose of them promptly when they are reached except where clear and compelling reasons supported by unequivocal and detailed facts require some further adjournment."

In the case at bar, plaintiffs' attorney and the plaintiffs failed to present to the court or furnish to the court factual justifiable reasons requiring an adjournment beyond January 14, 1976 when counsel for the plaintiffs was present.

In view of the history of this case and in the light of all of the proceedings had in the lower court, Judge

MacMahon was completely justified in refusing an adjournment and dismissing the action. Moreover, no facts were submitted to the lower court as to why the plaintiffs were not available nor was there any legal excuse offered to the court justifying the non presence of the attorney for the plaintiffs.

It is pertinent to note that plaintiff Mohamed Ali, in his affidavit submitted in support of an application to vacate the order of dismissal failed to mention or set forth any reasons for his inability or that of his wife Nadia Ali, to be present at the trial date.

As was pointed out by Judge MacMahon in his memorandum decision:

"Ali, however, does not even attempt to state or show any reason whatever, much less a justifiable excuse, for his or his counsel's inability to communicate and his consequent failure to appear for trial. There is absolutely no showing that plaintiffs were unavailable for trial for any reason beyond the control of themselves or their counsel."

It is respectfully submitted that the history of this case clearly indicates that Judge MacMahon did not abuse his discretion in dismissing the action and was justified in not granting a further adjournment since

there was no good cause and clear and compelling reasons supported by unequivocal and detailed facts requiring further adjournment.

There are numerous cases supporting the action taken by Judge MacMahon under circumstances comparable to the case at bar. To the same effect, See:

MAIORANI V. KAWASKI KISEN K.K.KOBE, 425 F. 2d 1162 (cert. den. 399 U.S. 910, reh. den. 400 U.S. 855) -

LEVINE V. COLGATE-PALMOLIVE CO., 283 F. 2d 532 (cert. den. 365 U.S. 821, rehear. den. 365 U.S. 855) -

RINIERI V. NEWS SYNDICATE CO., 385 F. 2d 818; HINES V. SEABOARD AIR LINE RAILROAD CO., 341 F. 2d 229;

CUCURILLO V. SCHULTE, BRUNS SCHIF GESELLSCHAFT, M.B.H. V. UNIVERSAL TERMINAL & STEVEDORING CORP., 324 F. 2d 234; OHLIGER V. UNITED STATES, 308 F. 2d 667; PARKER V. BROADCAST MUSIC, INC., 289 F. 2d 313; BARTON V. MONDON, 298 F. 2d 235.

CONCLUSION

The orders from which Appellant appeals should be affirmed, with costs.

Respectfully submitted,

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